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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MARGARET MAYER, individually and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased, *Petitioner*,

v.

CORNELL UNIVERSITY AND LAURA BROWN, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

I. Whether admiralty jurisdiction under the Death on the High Seas Act (DOHSA) requires a nexus to a traditional maritime activity as well as a marine locus.

II. Whether DOHSA or the general maritime law precludes application of a state survival statute, especially when there otherwise is diversity jurisdiction.

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IN THE SUPREME COURT OF THE UNITED STATES

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MARGARET MAYER, individually and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased, *Petitioner*,

v.

CORNELL UNIVERSITY AND LAURA BROWN, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Margaret Mayer, individually and as Executrix of the Estate of James E. Mayer, deceased, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-21) is not reported. One opinion of the district court (App. 49-76) is reported at 909 F.Supp. 81; the others (App. 22-34; App 38-40; App. 41-8; App. 77-200) are unreported.

JURISDICTION

The court of appeals entered its judgment on January 8, 1997 (App. 1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 761 of the Death on the High Seas Act ("DOHSA"), 46 U.S.C § 761, provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

The Seventh Amendment to the Constitution of the United States, U.S. CONST., amend. VII, provides in pertinent

part that "[i]n suits at common law * * * the right of trial by jury shall be preserved."

STATEMENT

A. Factual Background

James E. Mayer died on March 14, 1990 while snorkeling off the southwestern coast of Costa Rica. He and his wife, petitioner Margaret Mayer, were on a land-based birdwatching tour purchased through the Cornell Laboratory of Ornithology and operated by David Blanton, d/b/a Voyagers International. Laura Brown, an employee of the Laboratory, accompanied the tour to assist Voyagers' tour leader, Ken Rosenberg. The Marenco Biological Station of Costa Rica, which has no affiliation with Cornell University, conducted the snorkeling excursion and owned and operated the boat which carried the Cornell group to the snorkeling site.

The planned itinerary of the tour did not include snorkeling at Marenco. However, when the tour arrived at Marenco, the Station invited the members of the tour group to participate in an already-scheduled snorkeling excursion. Rosenberg, after consulting with Brown, offered the group the opportunity to go snorkeling. Neither Rosenberg nor Brown made any inquiry into safety precautions,

or into the snorkeling experience and ability of the tour members. Rosenberg and Brown decided that he would stay on the boat, and Brown would go into the water with the snorkelers.

A Marenco employee offered information concerning currents and pointed out the general area for snorkeling. As agreed, Brown went into the water with the snorkelers, including James Mayer, who was observed some time later swimming alone toward the shore. Upon Brown's return to the boat some fifteen minutes later, it was noticed that James Mayer had disappeared. His body was later found floating in the water near the shore. Petitioner brought a diversity action for, among other claims, negligence resulting in wrongful death, including a survival claim, in the United States District Court for the Northern District of New York on February 14, 1992.[1]

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[1] The defendants included Cornell, Brown, Blanton d/b/a Voyagers, Rosenberg, and Horizontes, a Costa Rican tour operator. Petitioner entered into a stipulation of settlement with Voyagers and Rosenberg, and a stipulation of discontinuance with Horizontes; only Cornell and Brown remained as defendants when the case was tried. Petitioner and

B. The Proceedings Below

Upon Cornell and Brown's motion to dismiss or, in the alternative, for summary judgment, the district court ruled that petitioner's wrongful death claim was governed by DOHSA and her remaining claims, by general maritime law. App. 28; App. 36. The court, relying on Friedman v. Mitsubishi Aircraft International, Inc., 678 F.Supp. 1064 (N.D.N.Y.1988) and Kunreuther v. Outboard Marine Corp., 757 F.Supp 633 (E.D.Pa.1991), ruled that the two-prong test for admiralty jurisdiction laid out in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) did not apply to actions under DOHSA, holding that "the requirement of a traditional maritime nexus is not a prerequisite to the exercise of admiralty jurisdiction." App. 27.

After petitioner filed an amended complaint, Cornell and Brown again moved for judgment on the pleadings or, in the alternative, summary judgment. Although the court granted the motion in part, petitioner's wrongful death and survival claims remained. The court ruled that

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her decedent were residents of Pennsylvania; Cornell, Brown, and Voyagers were residents of New York, and Rosenberg, a resident of Louisiana.

DOHSA and the survival statute of New York would govern her claims. App. 39.

On April 15, 1995, the district court determined that the case would be tried to a jury. In the court's view, nothing in DOHSA or the general federal maritime law precluded petitioner's state survival claim, and when claims carrying the right to a jury trial are joined with admiralty claims, those claims may be tried before a jury. App. 44. However, just prior to December 4, 1995, the scheduled trial date, the case was transferred to a different judge, who heard argument on Cornell and Brown's belated motion for reconsideration of the April 15th ruling.

The court granted the motion for reconsideration. Relying, as it was constrained to do, on the decisions of the Court of Appeals for the Second Circuit in Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F3d. 1084 (2d Cir. 1993) and in Preston v Frantz, 11 F.3d 357 (2nd Cir. 1993), which had ruled that the existence of a general maritime survival claim necessarily precluded a state survival action, the court concluded that both petitioner's wrongful death and survival claims were claims in admiralty. Accordingly, petitioner was not entitled to a jury trial. App. 65-72.

Following the two-week trial, the court directed the parties to submit post-trial briefs addressing only the issue whether Cornell and Brown owed a legal duty to plaintiff or her decedent. On April 16, 1996, the district court, finding no duty, ordered judgment entered in favor of the defendants. App. 200.

Petitioner appealed to the Court of Appeals for the Second Circuit, which affirmed the district court by summary order. In that order, the court reaffirmed its previous holding in Preston that the development of a general federal maritime survival action precluded state survival claims. Regarding petitioner's DOHSA claim, the court of appeals stated that the nexus requirement is a prerequisite for admiralty jurisdiction only in the absence of a statute to the contrary and DOHSA was such a statute; and, in any event, the requisite nexus existed here because "the accident occurred in navigable waters in the course of activities connected with a maritime commercial undertaking, ocean touring of passengers." App. 20.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals conflicts with those of other circuits, and of this Court, on two important

questions on which there has been a proliferation of conflicting decisions: (1) whether admiralty jurisdiction under DOHSA requires a nexus to a traditional maritime activity as well as a marine locus; and (2) whether DOHSA or general maritime law precludes application of a state survival statute, especially where there otherwise is diversity jurisdiction. The need for this Court's guidance here is acute. The decision below is erroneous, and the issues addressed are important, recurrent, and involve important principles of federal law.

NEXUS

I. THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE THIRD AND ELEVENTH CIRCUITS REGARDING WHETHER ADMIRALTY JURISDICTION UNDER DOHSA SOLELY DEPENDS UPON THE "LOCALITY" RULE, OR WHETHER A COURT MUST ALSO FIND A SIGNIFICANT RELATIONSHIP TO TRADITIONAL MARINE ACTIVITY.

In Executive Jet, this Court abandoned the traditional "locality of the wrong" test for admiralty jurisdiction and instead imposed a two-pronged query: whether the incident took place in navigable waters, and whether it bore a relationship to traditional maritime activity. In its construction of Executive Jet, the decision below squarely conflicts with that of the Third Circuit

in Kuntz v. Windjammer "Barefoot" Cruises, Ltd., 573 F.Supp. 1277 (W.D.Pa.1983), affd 738 F.2d 423 (3rd Cir. 1984), cert. denied, 469 U.S. 858 (1984), and with that of the Eleventh Circuit in Miller v. United States, 725 F.2d 1311 (11th Cir. 1984), cert. denied, 429 U.S. 821 (1984). Each case involves a wrongful death occurring more than a marine league from the United States shore, and each case considers whether DOHSA claims require a finding of a maritime nexus, or a significant relationship to traditional maritime activity. By applying the Executive Jet test to the DOHSA claims before them, the Third and Eleventh Circuits effectively hold that a claim under DOHSA must satisfy the nexus text. The court of appeals, however, by summarily affirming the district court's decision, concludes that the nexus test does not apply to DOHSA claims. The conflict is compounded by the Ninth Circuit's determination that relies exclusively on locality to confer admiralty jurisdiction on DOHSA claims, without even considering whether Executive Jet's maritime nexus requirements apply. Howard v Crystal Cruises, Inc., 41 F.3d 527 (9th Cir. 1994). Executive Jet states that its two-pronged test applies in the absence of "legislation to the

contrary," and some courts have concluded, without much examination of either Executive Jet or DOHSA itself, that DOHSA is such a statute.

The district court, in ruling that Executive Jet exempts DOHSA claims from the requirement of a traditional maritime nexus, failed to recognize that the holding of Executive Jet itself was limited to aviation torts, and that the case did not, in fact, involve a DOHSA claim. Only after this Court had found a maritime nexus for airplane crashes on the high seas -- concluding that planes carrying passengers over international waters fulfill a function once solely provided by ships -- did the Court append the two footnotes to Executive Jet upon which the district court here relied. In the first, the Court commented that "under the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may clearly be brought in a federal admiralty court." 409 U.S. at 271, n. 20. In the second, the Court considered domestic flights involving passage over the high seas and commented, "[t]o the extent that the terms of the Death on the High Seas Act become applicable to such flights, that Act, of course, is

'legislation to the contrary'." 409 U.S. at 274, n. 26. But these comments are predicated on Executive Jet's finding of a traditional marine nexus for passenger flights over the high seas.

Moreover, the district court overlooked that in Preston, the Second Circuit itself cited with approval the Eleventh Circuit's Miller opinion and, after analyzing a helicopter crash on the high seas, found sufficient nexus to traditional maritime activity to support admiralty jurisdiction under DOHSA. Instead, the district court, without analysis, simply adopted two distinguishable district court cases that are themselves analytically sparse.

The court in Friedman v. Mitsubishi Aircraft International, Inc., 678 F.Supp. 1064 (S.D.N.Y. 1988) concluded that the Executive Jet test is not applicable to an action brought under DOHSA simply by stating conclusorily that DOHSA was one of the statutes "to the contrary" that made it unnecessary to engage in the Executive Jet analysis, without discussing why this might be so. Relying solely on Friedman, the court in Kunreuther v Outboard Marine Corp., 757 F.Supp. 341 (D.N.J. 1995) reached the same conclusion.

In stark contrast, the Third and Eleventh Circuits hold that DOHSA confers

admiralty jurisdiction only if the court finds a nexus between the claim and traditional maritime activity, relying on this Court, rather than unsupported district court decisions, for precedent. In Miller, the Eleventh Circuit stated that "[a]ny determination of whether a tort is or is not within maritime jurisdiction begins with the Supreme Court's test for admiralty torts, enunciated in Executive Jet Aviation v. City of Cleveland [citation omitted]." Miller, 725 F.2d at 1313. The Miller court noted that Executive Jet required more than a finding of maritime locality to establish jurisdiction under DOHSA for aviation tort cases. Because the exclusive use of locality as the test for admiralty jurisdiction presented serious problems in cases not involving a significant relationship to traditional maritime cases, such as aviation and swimming tort cases, the locality of the wrong is not nearly as important as whether the "wrong bears a significant relationship to traditional maritime activity" in such borderline cases. Id.

The Third Circuit summarily affirmed without opinion the decision requiring a DOHSA nexus determination in Kuntz v. Windjammer "Barefoot" Cruises, Ltd., 573 F.Supp. 1277 (W.D.Pa. 1983), aff'd 738

F.2d 423 (3rd Cir. 1984), involving a DOHSA claim arising from a scuba-diving accident on the high seas. The district court concluded that, under Executive Jet, DOHSA provided a basis for admiralty jurisdiction "so long as there is a nexus with traditional maritime activity and, as here, a vessel on the high seas is involved." Kuntz, 573 F.Supp. at 1280.

Other district courts conflict in the interpretation and application of Executive Jet, and in particular footnotes 20 and 26, to DOHSA claims. Some mechanically apply DOHSA's strict locality rule without considering a maritime nexus (see, Pierpont v. Barnes, 892 F.Supp. 60 [D.Conn. 1995]; Palischak v. Allied Signal Aerospace Co., 893 F.Supp. 341 [D.N.J. 1995]; Baker v. Bell Helicopter/Textron, Inc., 907 F.Supp. 1007 [N.D.Tex. 1995]. Others hold that a significant relationship to traditional maritime activity must be found before actions may be brought under DOHSA (see, Brons v. Beech Aircraft Corp., 627 F.Supp. 230 [S.D.Fla. 1985]; Moyer v Klosters Rederi, 645 F.Supp. 620 [S.D.Fla.1986]; Hayden v Krusling, 531 F.Supp. 468 [N.D.Fla. 1982]). The need for clarity and uniformity is apparent, and this Court's guidance required.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN RODRIGUE v. AETNA CASUALTY AND SURETY CO.

In Rodrigue v. Aetna Casualty and Surety Co., 395 U.S. 352 (1969), which involved two deaths occurring on an artificial drilling island located in the high seas, this Court determined that the wrongful death action was not governed by DOHSA despite the location on the high seas, as location alone "is not enough to make [DOHSA] applicable." Rodrigue, 395 U.S. at 359. To supplement the location rule, the Court attempted to find a relation to traditional maritime activity and found none, noting that the accident "had no more connection with the ordinary stuff of admiralty than do accidents on piers." 395 U.S. at 360. Focusing on the importance of the defendant's activities in the nexus determination, Rodrigue stated that where a defendant engages in activities "not even suggestive of maritime affairs," DOHSA does not apply. 395 U.S. at 360-361.

Moreover, Rodrigue states that DOHSA "does not apply of its own force under admiralty principles." 395 U.S. at 355. In other words, a federal court cannot establish admiralty jurisdiction merely by finding that DOHSA's locality rule has been satisfied; a court must first establish an independent basis for subject

matter jurisdiction in admiralty. Nevertheless, directly conflicting with Rodrigue, the court of appeals here assumes, with no support other than its idiosyncratic interpretation of Executive Jet and two weak district court cases, that any death on the high seas falls under admiralty jurisdiction.

III. THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING THE PURPOSE AND SCOPE OF ADMIRALTY JURISDICTION AND THE EXTENT TO WHICH THIS COURT MAY REMEDY ANACHRONISMS IN CONGRESSIONAL LEGISLATION

Congress enacted DOHSA in 1920 to provide uniformity in the maritime laws by creating an action for wrongful deaths occurring on the high seas. Executive Jet, 409 U.S. at 249. State wrongful death actions at that time extended only to territorial waters, and there was no cause of action under federal admiralty common law for deaths on the high seas. The locality test incorporated without discussion into DOHSA was at that time the exclusive test for admiralty jurisdiction. But then, and now, courts have questioned the rationale for mechanical application of the locality rule, especially when faced with "borderline" claims involving a marine locality but no connection with

either a water-borne vessel or traditional maritime activities. 409 U.S. at 254-56.

Nothing in DOHSA's legislative history, or Congress' intent at the time it enacted DOHSA, or even in the language of DOHSA itself, precludes a court today from applying to DOHSA claims the nexus test already required under general federal admiralty law. Congress intended to unify admiralty law when it enacted DOHSA, filling a gap in the common law by providing a wrongful death action where none was available and enabling similarly situated plaintiffs to be similarly treated. As this Court has stated, "[n]othing in the [Death on the High Seas] Act * * * could be read to preclude this Court from exercising its admiralty power to remedy nonuniformities that could not have been anticipated when those statutes were passed." Miles v. Apex Marine Corp., 498 U.S. 19, 26-27 (1990).

The consequences of whether the law of admiralty or state law is applied are significant, in terms of available causes of action, damages, jury trials and procedure. Currently, the only factor determining whether similarly situated plaintiffs in DOHSA actions will experience substantially different judicial process is whether the case is heard in admiralty or under state law.

Like the Second Circuit, courts adhering strictly to DOHSA's locality test apply admiralty jurisdiction with all its attendant consequences, even if the incidents and defendants bear no connection to traditional maritime activity. Courts following the reasoning of the Third and Eleventh Circuits apply state law if they find no connection with traditional marine concepts.

This Court has not yet considered whether Executive Jet's nexus test extends to non-maritime, non-aviation torts occurring on the high seas. Although this Court has commented that "admiralty jurisdiction is expressly provided under DOHSA because the accidental deaths occurred beyond a marine league from shore," it did so only after finding that Executive Jet's nexus requirement had been satisfied. Offshore Logistic, Inc. v. Tallentire, 477 U.S. 207, 218-219 (1986). Similarly, in East River S.S. Corp. v Transamerica Delaval, 476 U.S. 858 (1986), a case involving ships engaged in traditional maritime commerce, this Court noted that "it need not reach the question whether a maritime nexus also must be established when a tort occurs on the high seas, but were there such a requirement, it clearly was met here." 476 U.S. at 863-864. However, substantive decisions

regarding the extent of admiralty jurisdiction belong with this Court, not with the divergent courts below.

IV. THE COURT OF APPEALS MISINTERPRETS AND MISAPPLIES THE MARITIME NEXUS TEST AS DEVELOPED BY THIS COURT IN SISSON v. RUBY, BY FOCUSING ON A NON-DEFENDANT'S MARITIME ACTIVITIES.

The court of appeals commented that even if a maritime nexus were required for cases under DOHSA, DOHSA would still apply to this case because "[t]he accident occurred in navigable waters in the course of activities connected with a maritime commercial undertaking, ocean touring of passengers." App. 20. This rationale misstates the nature of the activities giving rise to petitioner's wrongful death action, and flouts a line of this Court's cases that have further refined Executive Jet's test for maritime nexus.

Petitioner claims that her husband died during the snorkeling activity as a result of Cornell and Brown's failure to exercise a duty of care toward the tour participants as, respectively, the tour arranger and the tour assistant. These defendants did not control the boat, did not control the crew, and did not control the snorkeling trip. In other words, the charges leveled against the defendants, and the defendants themselves, have no

connection with traditional maritime activity.

In Sisson v Ruby, 497 U.S. 358 (1990), this Court refined the Executive Jet test for admiralty jurisdiction. First, a court must determine whether the accident occurred on navigable water, and second, whether the accident had a connection with maritime activity. Under this second inquiry, the court must first assess the "general features of the type of incident involved" to determine whether the incident has "a potentially disruptive impact on maritime commerce," and second, the court must determine whether "the general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity." 497 U.S. at 363-365.

Applying Sisson's test to the facts of this case, petitioner does not dispute that the accident met the locality requirements. But where, as here, the accident involves recreational swimming in sheltered coastal waters far from shipping lanes, the potential for disruption is minimal. The general character of the activity is the recreational snorkeling of land-based tour participants while under the aegis of official tour personnel. The duty of a land-based tour leader or assistant toward tour participants has

nothing to do with traditional concepts of maritime activity.

As this Court subsequently stated in Grubart, Inc. v. Great L.D. & D. Co., 513 U.S. 527 (1995), Sisson's nexus test turns on "the comparison of traditional maritime activity to the arguably maritime character of the tortfeasor's activity in a given case * * *." The substantial relationship test is satisfied when at least one alleged wrongdoer is engaged in traditional maritime activity, and that maritime activity is alleged to be the proximate cause of the accident. The inquiry into the general character of the activity focuses on the defendants' roles in the incident and on the specific charges brought against them, not on the maritime activities of non-defendants. Where, as here, the defendants were not engaged in traditional maritime activity, there is no basis for admiralty jurisdiction.

STATE SURVIVAL ACTIONS

V. THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE POSITION OF THE THIRD CIRCUIT REGARDING THE AVAILABILITY OF STATE LAW SURVIVAL ACTIONS

The Court of Appeals for the Second Circuit here sustained the ruling of the district court that the availablity of a

maritime survival action precludes a survival claim brought under a state survival statute.[2] In sustaining that ruling, the court of appeals is in conflict with the position taken by the Third Circuit, and with the rationale of this Court's recent ruling in Yamaha Motor Corp., U.S.A., v. Calhoun, __ U.S. __, 116 S.Ct. 619 (1996). Further, it ignores the

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[2] The circuits and districts have concluded, although not unanimously, that by analogy to Moragne, infra, general maritime law also provides a general maritime survival action, in which non-pecuniary damages may supplement DOHSA recovery. Azzopardi v Ocean Drilling & Exploration Co., 742 F.2d 890 (5th Cir. 1984); Barbe v Drummond, 507 F.2d 794 (1st Cir. 1974); McAleer v Smith, 791 F.Supp. 923 (D.R.I. 1992); Favaloro v S/S Golden Gate, 687 F.Supp 475 (N.D.Cal. 1987) (all ruling that DOHSA does not preempt general maritime law survival actions); cf., In re Air Crash Disaster Near Honolulu, Hawaii, 792 F.Supp. 1541 (N.D.Cal. 1990) (DOHSA preempts general maritime survival action for nonpecuniary damages.) In Miles v. Apex Marine Corp., 498 U.S. 19 (1990), this Court discussed, but declined to decide, whether there existed a general maritime survival action. Id. at 33-34.

separate Seventh Amendment basis for jurisdiction of the state claim arising out of the diversity of the parties, which guarantees the preservation of the common law claims. Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963); Atlantic & Gulf Stevedores, 369 U.S. 355 (1962).

In Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2d Cir.1993), cert. denied, 510 U.S. __, 114 S.Ct. 317 (1990), the court of appeals had previously held that this Court's creation in Moragne v. States Marine Lines, Inc., 398 U.S. 417 (1970), of a federal wrongful death action under general maritime law precluded resort to state wrongful death statutes in marine death claims. Subsequently, in Preston v. Frantz, 11 F.3d 357 (2d Cir.1993), the court of appeals further concluded that the recognition and development of a similar general marine survival action by many of the federal courts similarly precludes resort to state survival statutes in marine death claims. Accordingly, the district court here ruled, and the court of appeals agreed, that any survival claim brought by the petitioner was of necessity a claim under the general maritime law.

The Third Circuit, however, has long taken the position that DOHSA may be supplemented by a survival action brought

under state law. Shortly after Moragne, the Third Circuit decided in Dugas v. National Aircraft Corp., 438 F.2d 1386 (1971) that, where DOHSA applies, that statute provides the sole basis for recovery for wrongful death; however, DOHSA does not preempt "the separate and distinct remedy [for pre-death pain and suffering] encompassed in state survival statutes." The Third Circuit reaffirmed its position in Kuntz v. Windjammer "Barefoot" Cruises, 738 F.2d 423 (1984), cert. denied, 469 U.S. 858 (1984). See also, Palischak v. Allied Signal Aerospace Co., 893 F.Supp. 341 (D.N.J. 1995).

VI. THE DECISION OF THE COURT OF APPEALS THAT THE DEVELOPMENT OF A GENERAL MARITIME SURVIVAL ACTION PRECLUDES STATE SURVIVAL ACTIONS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The ruling of the Second Circuit here finds no support in this Court's reasoning and decisions. This Court has settled that DOHSA, by its terms, precludes recovery of non-pecuniary damages for wrongful death on the high seas. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978); Offshore Logistics, Inc. v Tallentire, 477 U.S. 207 (1986). Higginbotham and Tallentire, however, did not address the issue whether a claim under DOHSA could be accompanied by a

survival action for pre-death pain and suffering, and at the time this case was before the district court, no clear federal rule had emerged on the extent to which state survival statutes apply under either DOHSA or under the general federal maritime wrongful death action.

The sole authority and rationale provided by the court of appeals is this Court's concern in Moragne with what the court of appeals characterizes as "the tensions and discrepancies" resulting from the application of state law. This partial quotation, however, misrepresents the true concern of Moragne, which is not for uniformity per se, but for the "tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." Moragne, 398 U.S. at 401 (emphasis added).

Moragne was occasioned in part by the emergence of strict liability for unseaworthiness as a primary basis for recovery for seafarers' injury or death. 398 U.S. at 399. Because of the difference between this strict liability standard and the traditional negligence standard for state wrongful death actions, the breach of an identical duty could ground liability on the high seas but not within the territorial waters of a state

that did not recognize a claim of unseaworthiness as a basis for tort liability. This anomaly -- and particularly because it involved the "exclusively maritime substantive concept" of unseaworthiness -- led to this Court's creation of a general maritime action for wrongful death, where none had existed before. 398 U.S. at 401.

In Yamaha Motor Corp. v. Calhoun, 516 U.S. __, 116 S.Ct. 619 (1996), which concerned the application of state remedies to the death of a nonseafarer in territorial waters, the Court asked whether the existence of a federal maritime claim for wrongful death precludes all other remedies for nonseafarers. The Court noted that, prior to Moragne, the federal courts of admiralty "routinely applied state wrongful death and survival statutes in maritime accident cases," and queried "whether Moragne should be read to stop that practice." Yamaha, 116 S.Ct. at 624[3]

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[3] Although Yamaha speaks almost exclusively in terms of wrongful death statutes, its rationale was meant to include survival statutes as well. "Throughout this opinion, for economy, we use the term wrongful death remedies or statutes to include survival statutes."

In short, although the seminal and controlling case remains Moragne, the issue as posed by the Court is "not what Moragne added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock." 116 S.Ct. at 625, n. 7.

Even before Yamaha, the cases interpreting Moragne rejected the notion that uniformity of law was the primary goal in marine wrongful death cases. Rather, as Moragne itself made clear, the application of state remedies must be rejected only if they impact exclusively maritime substantive concepts, or are inconsistent with substantive federal policies. As the Court pointed out in Moragne, Congress enacted DOHSA to provide recovery only for deaths on the high seas and did not extend it to territorial waters, at least in part because at the time of that enactment the state remedies available for deaths in territorial waters were probably more generous than those provided by DOHSA. The divergent state remedies for death in territorial waters were not offensive to DOHSA because they were in harmony with its policy of providing recovery for all maritime deaths. Moragne, 398 U.S. at 397-398.

Yamaha, 116 S.Ct. at 624, n. 3.

Yamaha reaffirmed the long-standing view that variable state remedies are acceptable if they are "compatible with federal maritime interests," and noted that any uniformity concerns presented by the state remedies invoked in Yamaha were "of a different order" from those that compelled the Court's decision in Moragne. Yamaha, 116 S.Ct. at 626. An exception lies, however, where Congress has enacted a comprehensive recovery scheme, as it has with DOHSA or the Jones Act. In those cases, state remedies must gave way to the recovery allowed by the statute. However, because DOHSA, by its own terms, is limited to the high seas, the Congressional enactment does not preclude the application of state statutes to wrongful deaths in territorial waters.

But DOHSA is similarly limited by its own terms to recovery for wrongful death. Under the rationale of Yamaha, DOHSA should not therefore preclude the application of state survival statutes that provide remedies for pre-death pain and suffering, a cause of action as separate and distinct from that for wrongful death as the high seas are from territorial waters.

Nor, under Yamaha, should these remedies necessarily be displaced by the availability of a general maritime law

survival action, as Yamaha specifically rejected the view that Moragne, in creating a general maritime wrongful death action, had created a "solitary federal scheme" precluding the application of state remedies. The court of appeals here thus errs in failing to recognize that Yamaha completely vitiates its holding in Preston. If the general maritime survival action invoked there by the court of appeals is, as that court would have it, similar to the general maritime wrongful death action created by Moragne, it is similarly subject to the rationale of Yamaha.

One week after this Court rendered its decision in Yamaha, it decided Zicherman v. Korean Air Lines Co., Ltd, 516 U.S. __, 116 S. Ct. 629 (1996). There the Court held that DOHSA provided the substantive law for the measure of damages in an action under the Warsaw Convention involving an airplane shot down over the Sea of Japan, and therefore no recovery could be had for non-pecuniary damages. The Court reiterated the long-standing rule of Higginbotham and Tallentire that where DOHSA applies, neither state law nor general maritime law can provide recovery. However, the only question before the Court in Zicherman was the recovery of damages for wrongful death; the Court

expressly pointed out that it need not and did not address the district court's allowance of pre-death pain and suffering damages, or its grant of a jury trial,[4] as Korean Air Lines in its petition for certiorari had not raised those issues. Zicherman, 116 S.Ct. at 636, n.4. Nevertheless, at least one court, either ignoring or misreading Yamaha, and ignoring the distinction there recognized between a wrongful death action and a survival action, has now read Zicherman as precluding any survival claim for pre-death pain and suffering in a DOHSA case, on the ground that DOHSA provides the exclusive remedy. In Re Korean Air Lines Disaster of Sept. 1, 1983, 935 F.Supp 10 (D.D.C. 1996).

In light of this increasing confusion, the proliferation of conflicting decisions, and the erroneous determination of the court of appeals,

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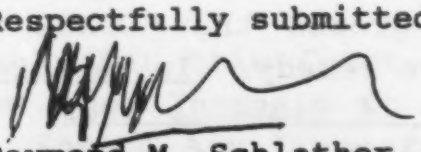
[4] One important consequence of a state survival action is entitlement to a jury trial. If a state claim is brought in diversity and thus has an independent basis for federal court jurisdiction, there is a Seventh Amendment right to a jury trial. Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963); Atlantic & Gulf Stevedores, 369 U.S. 355 (1962).

this Court should grant certiorari to address the question which it expressly declined to answer in Tallentire and was not asked to determine in Zicherman: whether a DOHSA claim also permits an action and a remedy under a state survival statute, especially when such an action is separately grounded in diversity jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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